(24,721)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 125.

CHRISTOPHER L. WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, APPELLANT,

vs.

JOHN P. COBB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1916.

1 *Subpœna.*

[L. S.]

The President of the United States of America to John P. Cobb, Greeting:

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of June, A. D. 1911, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Christopher L. Williams, as Receiver of The First National Bank of Mineral Point, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of Two hundred and fifty dollars.

Witness, The Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 4th day of May, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America, the one hundred and thirty-fifth.

JOHN A. SHIELDS, *Clerk.*

DICHMAN & HEFFERNAN,
Solicitors for Complainant.

2 The defendant is required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of June, 1911, or the bill will be taken pro confesso against him.

J. A. S., *Clerk.*

Due, proper and timely service of this subpœna is hereby admitted this 12th day of May, 1911.

(Endorsed:) —U. S. Circuit Court, Southern District N. Y..— Filed May 13, 1911.—John A. Shields, Clerk.

3 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant,
against
JOHN P. COBB, Defendant.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:

Your orator, Christopher L. Williams, as Receiver of The First National Bank of Mineral Point, a national banking association

organized under the laws of the United States, brings this his bill of complaint and thereupon your orator complains and alleges as follows:

First. That, at all the times hereinafter mentioned, The First National Bank of Mineral Point was a national banking association duly organized and existing under and by virtue of the laws of the United States and located in the City of Mineral Point
4 in the State of Wisconsin in the Western District of Wisconsin and having a capital stock of one hundred thousand dollars ($100,000) divided into one thousand (1,000) shares of the par value of one hundred dollars $100) each.

Second. Upon information and belief, that the defendant John P. Cobb is a citizen of the State of New York and an inhabitant and resident of the Borough of Manhattan in the City, County and State of New York in said Southern District of New York.

Third. That, on or about the 11th day of October, 1909, pursuant to the laws of the United States in such case made and provided, said association was duly found, by the Comptroller of the Currency of the United States, to be insolvent and unable to pay its just and legal debts.

Fourth. That, thereupon and on or about the 11th day of October, 1909, pursuant to the laws of the United States in such case made and provided, said Comptroller duly took possession of said association and duly appointed one John W. Schofield receiver thereof.

Fifth. That, thereafter and on or about the first day of December, 1909, said John W. Schofield resigned as such receiver.

Sixth. That, thereupon and on or about said first day of December, 1909, said Comptroller duly appointed your orator receiver of said association and all its property and assets in the place and stead of said John W. Schofield, resigned.

Seventh. That your orator thereupon, by said appoint-
5 ment, duly came into possession of all the assets and property of said association as such receiver.

Eighth. That, ever since his appointment as receiver as aforesaid, your orator has continued to act and is now acting as receiver of said association.

Ninth. Upon information and belief, that, prior to the 11th day of April, 1904, one Laura A. Cobb became the registered owner and holder of more than twenty (20) shares of the capital stock of said association.

Tenth. Upon information and belief, that said Laura A. Cobb died at Mineral Point in the County of Iowa in said State of Wisconsin, on said 11th day of April, 1904, leaving a last will and testament.

Eleventh. That in, and by said last will and testament, the defendant John P. Cobb and one Calvert Spensley, the president of said national banking association The First National Bank of Mineral Point, were nominated and appointed executors of and under said last will and testament of said decedent Laura A. Cobb.

Twelfth. Upon information and belief, that, at the time of her decease on said 11th day of April, 1904, as aforesaid, said Laura A.

Cobb was the registered owner and holder of more than twenty (20) shares of the capital stock of said national banking association The First National Bank of Mineral Point.

Thirteenth. That said last will and testament of said
6 Laura A. Cobb, deceased, was, on or about the 17th day of May, 1904, duly admitted to probate in the county court of Iowa county in said state of Wisconsin and the defendant and said Calvert Spensley qualified as executors thereunder.

Fourteenth. That, in and by her last will and testament, said testatrix Laura A. Cobb, deceased, directed the defendant and said Calvert Spensley, as her executors as aforesaid, to invest the sum of two thousand dollars ($2,000) of the estate of said decedent Laura A. Cobb in interest bearing securities and to pay the income thereof to one Catherine Monohan during the life of said Catherine Monohan.

Fifteenth. That, in and by her said last will and testament, said testatrix further directed her said executors to pay and distribute, upon the decease of said Catherine Monohan, said sum of two thousand dollars ($2,000) to certain persons in said last will and testament designated.

Sixteenth. That the defendant and said Calvert Spensley, as executors aforesaid, wholly failed and neglected to carry out the said direction of said testatrix to invest said sum of two thousand dollars ($2,000) of the estate of said testatrix in interest bearing securities and to pay the income thereof to said Catherine Monohan during the lifetime of said Catherine Monohan.

Seventeenth. That, on the contrary thereof, said defendant and said Calvert Spensley, as such executors, in a pretended attempt to carry out and comply with the said provisions and directions of said last will and testament of said decedent Laura A. Cobb,
7 caused and procured the transfer and registry upon the books of said association to themselves, as trustees for said Catherine Monohan, of twenty (20) shares of the capital stock of said association theretofore owned and held by and registered upon the books of said association in the name of Laura A. Cobb as aforesaid, and said twenty (20) shares of said capital stock were thereafter and continuously registered in the names of the defendant and said Calvert Spensley, as trustees for said Catherine Monohan, upon the books of said association, and were so registered at the time when said Comptroller took possession of said association as aforesaid.

Eighteenth. That, on or about the 3rd day of November, 1909, it appeared to the satisfaction of said Comptroller that, in order to pay the debts of said association, it was necessary to enforce the individual liability of the shareholders in said association therefor.

Nineteenth. That, thereupon and on or about said 3rd day of November, 1909, said Comptroller made an assessment and requisition upon the shareholders in said association for one hundred thousand dollars ($100,000), to be paid by them ratably on or before the 17th day of November, 1909, and made demand upon each and every one of said shareholders for one hundred dollars ($100)

upon each and every share of the capital stock of said association held or owned by them, respectively, at the time said association was found by said Comptroller to be insolvent as aforesaid, and directed the receiver of said association to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders, of all of which the defendant has had due notice.

8 Twentieth. That said twenty (20) shares of the capital stock of said association belonging to the estate of said decedent Laura A. Cobb was registered upon the books of said association in the names of the defendant and said Calvert Spensley as trustees for said Catherine Monohan at the time when said Comptroller levied said assessment and made said demand upon the shareholders in said association on or about said 3rd day of November, 1909, as aforesaid.

Twenty-first. That, by the laws of the state of Wisconsin, it is provided that, at the time of granting letters testamentary or of administration the county court, by order, shall fix a time, not less than six months nor more than one year thereafter, as the circumstances of the case may require, within which creditors shall present their claims for examination and allowance; and that, for good cause shown and upon such notice to the executor or administrator or other parties in interest as the court may direct, and not later than sixty days after the expiration of the time fixed as aforesaid, such time may be extended, but not beyond two years from the date of the letters; and that the Court shall fix also by said order a time after the presentation of claims for the examination and adjustment of any claims presented; that notice of the time within which creditors may present their claims and of the time when the same will be examined and adjusted by the court shall be given by publication as provided by the laws of said state of Wisconsin.

Twenty-second. Upon information and belief, that the time so limited by the laws of the State of Wisconsin as aforesaid, for the filing of claims by the creditors of the estate of said decedent

9 Laura A. Cobb against said estate had wholly expired, to wit, on or about the 3rd day of January, 1905, before said association was found by said Comptroller of the Currency to be insolvent as aforesaid, and before said demand and levy of said assessment by said Comptroller upon the shareholders in said association as aforesaid, and before the appointment of said John W. Schofield and your orator, respectively, as receivers of said association as aforesaid, and your orator is therefore precluded by the said laws of said state of Wisconsin from filing his said claim against said estate of said decedent with said executors and from enforcing the collection of said claim by an action at law against said executors.

Twenty-third. Upon information and belief, that, saving and excepting said twenty (20) shares of the capital stock of said association belonging to said estate of said decedent, Laura A. Cobb and registered upon the books of said association in the names of the defendant and said Spensley as trustee for said Catherine Monohan as aforesaid, said estate had been wholly and finally distributed by

the defendant and said Spensley, as executors of and under said last will and testament of said decedent, said association was found by said Comptroller of the Currency to be insolvent as aforesaid, and before said appointments of John W. Schofield and your orator, respectively, as receivers of said association, and before said demand and levy of said assessment by said Comptroller upon the shareholders in said association as aforesaid, and no assets or property now remain in the hand of the executors of said estate, as such, out of which said executors could, if willing so to do, pay any judgment at law that might be recovered by your orator, as such re-
10 ceiver, against said executors upon said assessment upon said twenty (20) shares of stock in said association.

Twenty-fourth. Upon information and belief, that on or about the 28th day of July, 1908, the defendant and said Spensley filed their final account as executors of and under said last will and testament of said Laura A. Cobb, deceased, in said county court of Iowa County in said State of Wisconsin, and then and there made oath that said estate of said decedent, Laura A. Cobb, had been wholly distributed prior to said 28th day of July, 1908, with the exception of said twenty (20) shares of the capital stock in said association held by them and registered in their names as trustees for said Catherine Monohan as aforesaid, and that no other property or assets of said estate of said decedent Laura A. Cobb remained in the hands of said executors as such.

Twenty-fifth. That said twenty (20) shares of stock so transferred to said defendant and said Spensley as trustees for said Catherine Monohan as aforesaid have not been distributed by the executors of and under said last will and testament of said Laura A. Cobb, deceased.

Twenty-sixth. Upon information and belief, that said defendant John P. Cobb was likewise one of the heirs and next of kin, to wit, a son of said decedent Laura A. Cobb and one of the distributees of her said estate under her said last will and testament, and, as such, has received from the executors of said estate more than twelve thousand dollars ($12,000).

Twenty-seventh. Upon information and belief, that, by the
11 statutes of said state of Wisconsin, it is provided that, where a claim against the estate of any deceased person remains contingent until after the time limited by said statutes for filing claims in the administration proceedings thereof but subsequently becomes absolute and assets of said estate have been paid to the distributees as legatees or next of kin of the decedent, an action will lie in favor of the claimant against such legatees or next of kin to recover the full value of such assets or sufficient thereof to satisfy such claim; and that actions against the next of kin or legatees of any deceased person to recover the value of any assets that may have been paid to them by any executor or administrator may be brought against all of said next of kin jointly or one or more of them, or against all of said legatees jointly or one or more of them; and that any of such next of kin against whom such recovery shall be had pursuant

to the statutes of said state of Wisconsin in such case made and provided may maintain an action against the other relatives of said decedent to whom any such assets may have been paid, jointly or against any of them separately, for a just and equal contribution, and shall be entitled to recover of each defendant such an amount as shall be in the same proportion to the whole sum collected of the plaintiff in such action for contribution as the value of the assets delivered to such defendant in such action bore to the value of all the assets delivered to all the relatives of the deceased.

Twenty-eighth. Upon information and belief, that said Catherine Monohan had no knowledge of the fact that the defendant Cobb and said Spensley had caused the transfer and registry upon the
12 books of said association to themselves as trustees for said Catherine Monohan of said twenty (20) shares of the capital stock of said association as aforesaid.

Twenty-ninth. That, by virtue of the premises and of the statutes of the United States in such case made and provided, the defendant became indebted to your orator, as such receiver, in the sum of two thousand dollars ($2,000), with interest thereon from said 17th day of November, 1909.

Thirtieth. That no part of said sum has been paid, although payment thereof has been duly demanded by your orator before the commencement of this suit.

Thirty-first. That payment thereof has been refused by the defendant.

Thirty-second. That your orator brings this suit as a receiver duly appointed by said Comptroller of the Currency of the United States and under the authority and by direction of said Comptroller.

Inasmuch, therefore, as your orator has no adequate remedy at law for his aforesaid grievance and can have relief only in equity, he files this bill of complaint and prays for equitable relief as follows:

1. That it may be adjudged and decreed that said transfer and registry upon the books of said national banking association, the said The First National Bank of Mineral Point, by said defendant John P. Cobb and said Calvert Spensley, as executors of and under
13 said last will and testament of said Laura A. Cobb, deceased, of said twenty (20) shares of the capital stock in said association to themselves as trustees of said Catherine Monohan was unauthorized and void and ineffective to divest the said estate of said decedent Laura A. Cobb of the ownership of said twenty (20) shares of said stock.

2. That it may be adjudged and decreed that, notwithstanding such transfer as aforesaid, said twenty (20) shares of stock still remained and were the property of the said estate of said decedent Laura A. Cobb at the time when said association was found by said Comptroller of the Currency to be insolvent and at the time of the levy of said assessment and demand by said Comptroller upon the shareholders in said association.

3. That it may be adjudged and decreed that the defendant John P. Cobb, as one of the next of kin of said decedent Laura A. Cobb

and one of the distributees of and under said last will and testament of said decedent and the recipient of assets of the estate of said decedent of the value of more than twelve thousand dollars ($12,000), pay to your orator, as receiver of said insolvent national banking association, the said The First National Bank of Mineral Point, the ratable amount of the assessment levied by said Comptroller of the Currency upon the holder or owner of said twenty (20) shares of the capital stock of said association, to wit, the sum of two thousand dollars ($2,000), with interest thereon from said 17th day of November, 1909.

4. That, temporarily and pending this suit, an injunction may issue against the defendant and all persons claiming and acting by, through or under him, and all other persons, to restrain them from transferring or otherwise disposing of the assets or property of said defendant, and that your orator may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity.

5. That the defendant be required to make answer unto all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were herein expressed and he thereunto particularly interrogated.

6. That a writ of subpœna may be granted to your orator to be directed to the defendant, therein and thereby requiring the defendant personally to be and appear on a day certain before your Honors in this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, which is hereby expressly waived), and further to perform and abide by such further order, direction or decree therefor as to the Court shall seem meet.

7. That your orator have such further and other relief as the Court may deem proper and equitable.

And your orator will ever pray, etc.

DICHMAN & HEFFERNAN,
Solicitors for Complainant, 90 Wall Street,
Borough of Manhattan, City of New York, N. Y.

ERNEST DICHMAN,
JOHN FRANCIS HEFFERNAN,
Of Counsel.

STATE OF WISCONSIN,
County of Iowa,
Western District of Wisconsin, ss:

Christopher L. Williams, being duly sworn, deposes and says: That he, as receiver, of The First National Bank of Mineral Point, is the Complainant herein; that he has read the foregoing complaint and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters which are herein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

CHRISTOPHER L. WILLIAMS.

Subscribed and sworn to before me, a Notary Public in and for the County of Iowa, State of Wisconsin, in the Western District of Wisconsin, this 26th day of January, 1911.

[SEAL.] JOSEPH J. FIEDLER,
Notary Public, Iowa County, Wisconsin.

My commission expires July 14, 1912.

STATE OF WISCONSIN,
County of Iowa, ss:

Office of Clerk of Court.

I, Thos. Gibbon, Clerk of the Circuit Court of the County of Iowa, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Joseph J. Fiedler, Esquire, whose name appears subscribed to the annexed instrument was, at the date thereof, a Notary Public within and for said State, residing in said County, duly appointed and qualified, and empowered by the law of said State to administer oaths, take acknowledgment
16 of deeds and perform such other duties as by laws of nations, or according to commercial usage, may be performed by Notaries Public; and that to his acts and attestations, as such, full faith and credit are and ought to be given in court and out. I further certify, that I verily believe said signature purporting to be his, is genuine; that the seal thereunto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of said State.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Dodgeville, in said county and state on this 26th day of January, 1911.

[SEAL.] THOS. GIBBON,
Clerk of Circuit Court, as Aforesaid.

(Endorsed:) U. S. Circuit Court, S. D. of N. Y. Filed May 4, 1911. John A. Shields, Clerk.

17 *Demurrer.*

Circuit Court of the United States for the Southern District of New York.

In Equity.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant,
against
JOHN P. COBB, Defendant.

The Demurrer of the Above-named Defendant, John P. Cobb, to the Bill of Complaint of the Above-named Plaintiff.

This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained

to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill. And for cause of demurrer showeth:

That said plaintiff has not in and by said bill made or stated any such cause as doth or ought to entitle him to any such relief in equity as is thereby sought and prayed for from or against this defendant.

Wherefore, and for divers and other good causes of demurrer appearing on said bill, this defendant doth demur thereto,
18 and he prays the judgment of this Honorable Court whether he shall be compelled to make any answer to said bill and prays to be hence dismissed with his reasonable costs in this behalf sustained.

K. R. BABBITT,
Solicitor and Counsel for Defendant, John P. Cobb,
111 *Broadway, New York City, New York.*

I hereby certify the foregoing demurrer is in my opinion well founded in point of law.

K. R. BABBITT,
Of Counsel for Defendant, John P. Cobb.

June 28th, 1911.

STATE OF NEW YORK,
City and County of New York,
Southern District of New York, ss:

John P. Cobb, being duly sworn, deposes and says: That he is the defendant above named and that the foregoing demurrer is not interposed for delay.

JOHN P. COBB.

Subscribed and sworn to before me this 28th day of June, 1911.

[SEAL.] ARTHUR J. RONAGHAN,
Notary Public, Queens County.

Certificate filed in New York County, Register's Office, N. Y. Co., Cert. No. 2171.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed July 3, 1911. John A. Shields, Clerk.

19 District Court of the United States, Southern District of New York.

CHRISTOPHER L. WILLIAMS, as Receiver,
vs.
JOHN P. COBB.

On Demurrer to Bill of Complaint.

Mr. Babbitt for Defendant-Demurrant.
Mr. Heffernan for Complainant.

Memorandum.

It may be that under the law of Wisconsin the executors of Mrs. Cobb were not authorized in investing trust funds in shares of a national bank, nor in assigning to a trust fund created by Mrs. Cobb's will any part of her property consisting of shares of a National Bank. But the only persons injured by such infraction of Wisconsin law are the cestuis que trustent and (perhaps) the state of Wisconsin.

It is no concern at all of this Receiver, who owns these shares, as long as they were actually owned by the persons pretending to own them.

On the face of the bill it is to me plain that they were actually owned by Cobb and another as executors, but the suit is not against the executors.

On complainant's own theory, if the assignment of these
20 shares to a trust fund was a nullity, then they remain undistributed assets, for which the executors are responsible as executors; so that in any event the bill shows no cause of action against Cobb individually.

The demurrer is sustained with costs, and leave to amend is not granted; final judgment will be entered for defendant.

January 8, 1912.

Final Decree.

At a stated term of the United States District Court, held in and for the Southern District of New York, in the Post-Office Building in the Borough of Manhattan, City of New York, on the 16th day of January, 1912.

Present: Hon. Charles M. Hough, Judge.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant,
against
JOHN P. COBB, Defendant.

This cause having regularly come on to be heard on the defendant's general demurrer to the complainant's bill of complaint,
21 and after hearing K. R. Babbitt in support of said demurrer, and John Francis Heffernan in opposition thereto, and due deliberation having been had, it is

Ordered, Adjudged and Decreed, that said demurrer be and the same hereby is in all things sustained, the bill of complaint dismissed upon the merits, and final judgment is hereby directed to be entered for the defendant with costs as taxed by the Clerk amounting to Eighty Dollars and Seventy Cents ($80.70), and that the said defendant have execution therefor.

(Sd.) CHARLES M. HOUGH,
Judge of the United States District Court,
Southern District of New York.

(Endorsed:) Due and proper service of a copy of the within decree is hereby admitted. Dated January 13, 1912. Dichman & Heffernan, Solicitors for Compl't. U. S. District Court, S. D. of N. Y. Filed Jan. 18, 1912.

22 *Notice of Appeal.*

District Court of the United States, Southern District of New York.

In Equity. No. 7-193.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant,
against
JOHN P. COBB, Defendant.

SIR: Please take notice that the undersigned hereby appeals from the decree of this Court, made and entered herein on the 16th day of

January, 1912, to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, N. Y., February 28, 1912.

CHRISTOPHER L. WILLIAMS,
As Receiver of The First National Bank of Mineral Point, Complainant,
By DICHMAN & HEFFERNAN,
His Solicitors.

23 To K. R. Babbitt, Esquire, Solicitor for Defendant, 111 Broadway, Borough of Manhattan, New York City, N. Y.

[Endorsed:] U. S. District Court, S. D. of N. Y.—Filed Feb. 29, 1912.

Petition of Appeal.

District Court of the United States, Southern District of New York.

In Equity. No. 7-193.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant-Appellant,
against
JOHN P. COBB, Defendant-Respondent.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

And now comes Christopher L. Williams, as Receiver of The First National Bank of Mineral Point, Complainant and
24 Appellant, and prays for a reversal of the judgment and decree of the District Court of the United States for the Southern District of New York in the suit brought by said Christopher L. Williams as Receiver of The First National Bank of Mineral Point, Complainant and Appellant, against John P. Cobb, Defendant and Respondent, which judgment and decree was entered in the office of the Clerk of the District Court of the United States for the Southern District of New York on or about the 16th day of January, 1912.

DICHMAN & HEFFERNAN,
Solicitors for Complainant-Appellant.

[Endorsed:] U. S. District Court.—Filed Feb. 29, 1912.

25 *Assignment of Errors.*

District Court of the United States, Southern District of New York.

In Equity. No. 7-193.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant-Appellant,
against
JOHN P. COBB, Defendant.

And now comes the complainant, by Dichman & Hefferman, his solicitors, and says that the final order and decree made and entered in the above-entitled cause is erroneous and against the just rights of said complainant in the following particulars:

First. The Court erred in failing to take judicial notice of the laws of the state of Wisconsin with respect to the investment of trust funds and funds of the estates of decedents and in failing to hold, except by implication, that, by the said laws, the attempted transfer by the defendant and another from themselves as executors of and under the last will and testament of Laura A. Cobb, deceased, to themselves "as trustees for Catherine Monohan" of said 20 shares of the capital stock in The First National Bank of Mineral
26 Point belonging to the estate of said Laura A. Cobb, deceased, was void and did not invest said decedent's estate of the ownership of said shares.

Second. The Court erred in failing to hold, except by implication, that, by the admissions of the demurrer, said attempted transfer by the defendant and another from themselves as such executors to themselves "as trustees for Catherine Monohan" of said 20 shares of stock was not authorized by said last will and testament of said Laura A. Cobb, deceased, but was in violation of the terms of said last will and testament and was void and did not divest said decedent's estate of the ownership of said shares.

Third. The Court erred in failing to hold, except by implication, that, by the admissions of the demurrer, the defendant and his co-executor were not authorized by said last will and testament of said decedent to create in said Catherine Monohan any estate in said 20 shares of the capital stock of said national banking association.

Fourth. The Court erred in holding that the complainant herein was not injured by the infraction by the defendant of the laws of the state of Wisconsin.

Fifth. The Court erred in holding that "the only persons injured by such infraction" by the defendant of the laws of the State of Wisconsin referred to in the complaint herein "are the cestuis que trustent and (perhaps) the state of Wisconsin."

Sixth. The Court erred in holding that "It is of no concern at all of this Receiver, who owns these shares, as long as they
27 were actually owned by the persons pretending to own them."

Seventh. The Court erred in holding that the complainant's cause of action is against the defendant and another as executors of said Laura A. Cobb, deceased, and not against the defendant individually, and in failing to hold that, by the admissions of the demurrer, the complainant is precluded by the laws of the state of Wisconsin referred to in the complaint, from filing his claim against said estate of said decedent with said executors and from enforcing the collection thereof by an action at law against said executors, and that, saving and excepting said 20 shares of the capital stock of said association, said estate of said decedent had been wholly and finally distributed by the defendant and his said co-executor of and under said last will and testament of said decedent, before said association was found by the Comptroller of the Currency to be insolvent and before the appointment of the complainant and his predecessor, respectively, as receivers of said association, and before said demand and levy of said assessment of said Comptroller upon the shareholders in said association, and that no assets or property now remain in the hands of the defendant, and his co-executor, as executors of said decedent, out of which said executors could, if willing so to do, pay any judgment at law that might be recovered by the complainant against said executors upon said assessment upon said 20 shares of stock in said association, and that, prior to the insolvency of said association and the appointment of a receiver thereof and prior to said demand and levy by the Comptroller of the Currency, the defendant and his co-executor, had filed their final account as executors of said decedent in the proper court and had then
28 and there made oath that said estate of said decedent had theretofore been wholly distributed, with the exception of said 20 shares of stock in said association, and that no other property or assets of said estate of said decedent Laura A. Cobb then remained in the hands of said executors as such.

Eighth. The Court erred in failing to take judicial notice and to hold that, by the law of said state of Wisconsin referred to in the complaint herein, the complainant is barred by the laws of said state of Wisconsin referred to in the complaint herein from filing his claim as such receiver against the estate of said decedent Laura A. Cobb with said executors and from enforcing the collection of said assessment levied by said Comptroller of the Currency, by suit or otherwise, against the defendant and his co-executors as such executors.

Ninth. The Court erred in holding that, "if the assignment of these shares to a trust fund was a nullity, then they remain undistributed assets, for which the executors are responsible as executors," and in failing to take judicial notice and to hold that, by the laws of said state of Wisconsin referred to in the complaint herein, said executors are not responsible, as executors, for the assessment levied by the Comptroller of the Currency against the shareholders of The First National Bank of Mineral Point, or any part thereof.

Tenth. The Court erred in holding "that in any event the bill" of complaint herein "shows no cause of action against" the defendant John P. "Cobb individually."

29 Eleventh. The Court erred in failing to take judicial notice and to hold that, by the laws of the United States and of the state of Wisconsin, respectively, referred to in the complaint herein, and by the admissions of the demurrer, the defendant John P. Cobb, as one of the next of kin of said Laura A. Cobb, deceased, and as a legatee and distributee and the recipient of assets of the estate of said decedent, is individually liable, ratably, for said assessment upon said 20 shares of the capital stock of said association levied by the Comptroller of the Currency against the shareholders of the said The First National Bank of Mineral Point.

Twelfth. The Court erred in failing to hold that, by the admissions of the demurrer, the complainant is equitably entitled to the relief prayed for in his bill of complaint.

Thirteenth. The Court erred in refusing to the complainant the privilege of amending his bill of complaint in such manner as would cure any defects pointed out in the opinion of the Court filed herein.

Fourteenth. The Court erred in failing to hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

Fifteenth. The Court erred in refusing to grant the relief as prayed for in complainant's bill.

Sixteenth. The Court erred in sustaining the demurrer and directing that the bill of complaint be dismissed.

30 Seventeenth. The Court erred in holding that the defendant was entitled to recover any costs herein from the complainant.

Wherefore, the complainant prays that the said decree be reversed and that the said Court may be directed to enter a decree in accordance with the prayer of his bill of complaint and for such other and further relief as may be just in the premises.

CHRISTOPHER L. WILLIAMS,
As Receiver of the First National Bank of Mineral Point, Complainant.
By DICHMAN & HEFFERNAN,
His Solicitors.

[Endorsed:] U. S. District Court, S. D. of N. Y.—Filed Feb. 29, 1912.

31 *Citation.*

To the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to John P. Cobb, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 29th day of March, 1912, pursuant to a notice of appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Christopher L. Williams, as Receiver of The First

National Bank of Mineral Point, is Complainant, and you are Defendant, to show cause, if any there be, why the decree in said notice mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 29th day of February, in the year of our Lord One Thousand Nine
32 Hundred and Twelve, and of the Independence of the United States the One Hundred and Thirty-sixth.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:)—Service of a copy of the within Citation is hereby admitted this 4th day of March, 1912.—K. R. Babbitt, Solr. for Deft.-Respondent.—U. S. District Court, S. D. of N. Y.—Filed Mar. 26, 1912.

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant-Appellant,
against
JOHN P. COBB, Defendant-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter as agreed to by both parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the said United States the One Hundred and Thirty-sixth.

[SEAL.] ALEXANDER GILCHRIST, JR., *Clerk.*

34 *Stipulation.*

United States District Court for the Southern District of New York.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Complainant-Appellant,
against
JOHN P. COBB, Defendant-Appellee.

It is hereby stipulated that the foregoing consists of a true and correct copy of the record in the above entitled case and the whole thereof now on file in the office of the Clerk of the District Court of the United States for the Southern District of New York, and that said Clerk may so certify the same.

Dated, New York, May 28, 1913.

DICHMAN & HEFFERNAN,
Solicitors for Complainant.
R. K. BABBIT,
Solicitor for Defendant.

35 United States Circuit Court of Appeals for the Second Circuit, October Term, 1914.

Argued October 5, 1914. Decided December 15, 1914.

Appeal from the District Court of the United States for the Southern District of New York.

No. 8.

CHRISTOPHER L. WILLIAMS, as Receiver, etc., Complainant-Appellant,
vs.
JOHN P. COBB, Defendant-Appellee.

Before Lacombe, Coxe and Rogers, Circuit Judges.

Dichman & Heffernan, Solicitors for Appellant.
John Francis Heffernan, John M. Nolan, Joseph P. Nolan, of Counsel.
K. R. Babbitt, Solicitor and of Counsel for Defendant-Appellee.

This cause comes here upon appeal from a final decree dismissing the bill of complaint and entering final judgment for defendant entered in the United States District Court for the Southern District of New York on January 16, 1912.

36 ROGERS, *Circuit Judge:*

The First National Bank of Mineral Point, Wisconsin, was a national banking association duly organized and existing under and by

virtue of the laws of the United States. And on October 11, 1909, it was found by the Comptroller of the Currency of the United States to be insolvent and unable to pay its debts. Thereupon the complainant was duly appointed receiver of all its property and assets and took possession of the same.

It appears that one Laura A. Cobb became the registered owner and holder of certain shares of the capital stock of the bank and retained the same at the time of her death on April 11, 1904. In her last will and testament she appointed John P. Cobb, the defendant herein, and one Calvert Spensley, her executors, and directed them to invest the sum of two thousand dollars of her estate in interest bearing securities and to pay the income thereof to one Catherine Monohan during the life of the said Catherine Monohan and upon the latter's decease to pay the same over to certain persons designated in the will.

The will was duly admitted to probate in the county court of Iowa County in the State of Wisconsin and Cobb and Spensley qualified as executors. The executors instead of investing two thousand dollars in interest bearing securities as directed by the testatrix caused and procured the transfer and registry, upon the books of the Bank, of twenty shares of the capital stock of the Bank to themselves as trustees for Catherine Monohan and they remained so registered at the time when the Comptroller took possession of the Bank and they so remain at the present time. The stock so transferred was stock which at the time of the death of the testatrix and at the time of the transfer stood on the books of the Bank in the name of the testatrix.

In order to pay the debts, the Comptroller of the Currency found it necessary to make an assessment upon the shareholders for one hundred thousand dollars and such an assessment was made on November 3, 1909, to be paid by the shareholders ratably on or before November 17, 1909, and demand was made upon each and
37 every one of the shareholders for one hundred dollars upon each and every share of the capital stock of the bank held or owned by them respectively at the time the Bank was found to be insolvent. The receiver was directed to take all necessary proceedings to enforce the individual liability of the shareholders.

The suit was commenced against the defendant Cobb upon the theory that the estate of Laura A. Cobb was liable upon this assessment upon the twenty shares of the stock which the executors had transferred to themselves as trustees. The receiver contends that the executors had no authority either under the terms of the will or the statutes of Wisconsin to invest trust funds in the stock of a National Bank, and that the transfer of the stock from themselves as executors to themselves as trustees was wrongful and did not constitute Catherine Monohan the beneficial owner of the stock and that therefore she could not be compelled to pay the assessment. It is alleged in the bill and upon the demurrer must be taken as true "that said Catherine Monohan had no knowledge of the fact that the defendant Cobb and said Spensley had caused the transfer and registry upon the books of said association to themselves as trustees for said

Catherine Monohan of said twenty (20) shares of the capital stock of said association as aforesaid.

The Court was, therefore, asked to adjudge and decree that the transfer of the stock made by the executors to themselves as trustee was unauthorized and void, and ineffective to divest the estate of the decedent Laura A. Cobb of the ownership of the stock; and that notwithstanding the transfer the stock still remained as the property of the estate of Laura A. Cobb at the time the Bank was found by the Comptroller to be insolvent and at the time of the assessment upon the shareholders.

It appears that prior to the time when the Comptroller found the bank was insolvent, Cobb and Spensley had filed their final account as executors on July 28, 1908, and had at that time made oath that the estate of Laura A. Cobb had been wholly distributed with the exception of the shares of stock held by them and registered in their names as trustees and that no other property or assets of Laura A. Cobb remained in the hands of said executors as such.

38 It further appears that this suit has been brought against John P. Cobb individually because of a provision contained in a statute of Wisconsin which provides that where a claim against the estate of any deceased person remains contingent until after the time limited for filing claims has expired and then subsequently becomes absolute and the assets of the estate have been paid to the distributees as legatees or next of kin, an action will lie in favor of the claimant against such legatees or next of kin to recover the full value of such assets or sufficient thereof to satisfy such claim; and that actions against the next of kin or legatees of any deceased person to recover the value of any assets that may have been paid to them by any executor or administrator may be brought against all of said next of kin jointly, or one or more of them, or against all of said legatees jointly or one or more of them. The statute provides that any such next of kin against whom such recovery shall be had may maintain an action against the other relatives of the decedent to whom assets may have been paid for a just and equal contribution in such an amount as shall be in the same proportion to the whole sum collected of the plaintiff as the value of the assets delivered to such defendant in such action bore to the value of all the assets delivered to all the relatives of the deceased.

The defendant Cobb was, as we have said, one of the executors of Laura A. Cobb, whose son he was, and was also one of the distributees under the will, and as such received from the executors more than twelve thousand dollars.

The court below sustained the demurrer to the bill and filed the following memorandum:

"It may be that under the law of Wisconsin the executors of Mrs. Cobb were not authorized in investing trust funds in shares of a national bank, nor in assigning to a trust fund created by Mrs. Cobb's will any part of her property consisting of shares of a National Bank. But the only persons injured by such infraction of Wisconsin law are the cestuis que trustent and (perhaps) the State of Wisconsin.

39 It is no concern at all of this Receiver, who owns those shares, as long as they were actually owned by the persons pretending to own th-m.

On the face of the bill it is to me plain that they were actually owned by Cobb and another as executors, but the suit is not against the executors. On complainant's own theory, if the assignment of these shares to a trust fund was a nullity, then they remained undistributed assets, for which the executors are responsible as executors; so that in any event the bill shows no cause of action against Cobb individually.

The demurrer is sustained with costs, and leave to amend is not granted; final judgment will be entered for defendant."

The law is well settled in England that in the absence of a statute authorizing it trustees cannot invest trust funds in the stock of a bank or of any private corporation unless the author of the trust had conferred such authority upon the trustee. The English rule has been adopted in some of the States of this country as in Illinois, New York and Pennsylvania. Penn. v. Fogler, 182 Ill. 76 (1899); King v. Talbot, 40 N. Y., 76 (1869); Worrell's Appeal, 23 Penn. St. 44 (1854). In others, as in Massachusetts and Maryland such investments are allowed when the corporations have acquired by reason of the amount of their property and the prudent management of their affairs such a reputation that cautious and intelligent persons commonly invest their own money in such stocks. Green v. Crapo, 181 Mass. 55 (1902); Brown v. French, 125 Mass., 410 (1878); McCoy v. Horwitz, 62 Md. 183 (1884).

In Wisconsin the courts appear to have followed the English rule. In Simmons v. Oliver, 74 Wis. 633, 636, 637 (1889) the court after calling attention to the English rule that trustees can only invest the trust fund in real estate or government securities says: "We prefer to adhere to the well established rule in relation to the investment of trust funds and if a change is to be made let the legislature make it." See also Pabst v. Goodrich, 133 Wis.

40 42, 76a (1907). In 1903 the legislature of Wisconsin passed an act specifying the securities in which such funds may be invested and modified the English rule to some extent. It authorized the investment of trust funds in the mortgage bonds or preferred stock of railroad corporations subject to certain restrictions but it conferred no authority to invest in the stock of banks. Laws of Wisconsin, chapter 317, 1903.

It is true that a creator of a trust may direct how investments shall be made and that he may authorize investments other than those which the rules and practice of the courts sanction. In this case the author of the trust gave authority to invest "interest bearing securities." It cannot be claimed, however, that the stock of a National Bank is an interest bearing security. Shares of stock may be "securities" but certainly they are not "interest bearing."

The fact that the trustees had no right under the rules and practice of the courts of Wisconsin to invest in the stock of a national bank did not prevent title to the stock vesting in them as trustees when it was transferred to them as trustees on the books of the bank.

When an executor is also a legatee or distributee no formal act is necessary to vest title to the legacy or distributive share in him as an individual. Any act on his part showing an intention to retain assets in payment is sufficient. So if the person named as an executor in the will is also named as a trustee the rule in England and in many of the States of this country seems to be that if as executor he clearly sets apart and appropriates a particular fund to himself as trustee he holds that fund as trustee and not as executor. See Perry on Trusts, 6th ed. vol. 1 sec. 263; Ruffin v. Harrison, 81 N. C., 208 (1879).

The legal difference between the two relations of executor and trustee is clearly defined and quite important, although it is sometimes difficult to determine in a particular case whether an executor has ceased to hold a fund as executor and assumed the attitude of a trustee. In the case before us there seems to be no difficulty of that kind as the shares of stock were taken from the assets of the estate and transferred on the books of the company by the executors to themselves as trustees. In doing this the executors treated
41 the stock as a separate trust fund and they held themselves out to the world as trustees of the fund for the cestui que trust Catherine Monohan. The stock then ceased to be a part of the assets of the testatrix and the executors ceased to hold as executors and from that time on have held as trustees.

It cannot be assumed that the transfer of the stock was void and without effect. Under the common law rule and in the absence of any statute providing otherwise an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass a good title to the property and it is not necessary to have any order of court for the purpose. Munteith v. Rahn, 14 Wis. 210; In re Gay, 5 Mass. 419; Leitch v. Wells, 48 N. Y., 585. If an executor sells the stocks of the estate to himself in his individual capacity he does something which he has no right to do but it is something which he has a capacity to do and if he does it title passes. The transaction is not void but only voidable at the option of those interested. Grim's Appeal, 105 Pa. St., 375; Tate v. Dalton, 41 N. C., 562. And the courts have held that if the executor having acquired title in his individual capacity subsequently sells it to a third party the purchaser acquires an absolute title. Cannon v. Jenkins, 16 N. C., 422. In the same way it follows that if executors having title to stocks belonging to the estate upon which they are administering transfer, those stocks to themselves as trustees upon the books of the corporation the transfer is not void but only voidable. If in the particular jurisdiction the trustees are entitled to invest trust funds in such stocks as those transferred, the transfer is valid. But if such an investment is unauthorized the transfer of title is simply voidable and until it has been set aside the title is in the trustees as such and not in the executors. The common law rule has been changed by statute in some states in which the executor is required to obtain an order from the court before he can sell the assets. Where this is the law and a transfer of the assets is made by an executor who has not obtained an order of

court authorizing it, the transfer in such a case would be void rather than voidable. Our attention, however, has not been called
42 to any statute in Wisconsin making an order of sale necessary in such cases and we assume that the law of that state remains as it was at common law.

Not only did the executors transfer the stock to themselves as trustees but as executors of the estate they filed their final account in a proper court in Wisconsin on July 28, 1908,—more than a year before the bank failed—and made oath that said estate had been wholly distributed prior to that date, with the exception of the 20 shares of stock registered in their names as trustees for Catherine Monohan, and that no other property or assets of the estate remained in their hands.

As the trustees for Catherine Monohan hold an improper investment in stocks for her she had the right when the nature of the investment was brought to her attention to accept or reject it. If she accepted it, or had lost her right by laches or acquiescence to reject it, she would no doubt be liable under the statutes of the United States as a stockholder. Section 5152 of the Revised Statutes provides that "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

If she rejected the investment or still has a right to reject it, about which no opinion is expressed, then it would seem that the trustees hold the stock in their individual right and would themselves be liable as such upon the stock.

If we understand the opinion of the court below the shares of stock which the executors held as a part of the estate of Mrs. Cobb they continued to hold as executors notwithstanding their transfer of the stock to themselves as trustees of Catherine Monohan. This conclusion is based on the theory that the transfer to themselves as trustees was a nullity as trustees are not authorized in Wisconsin to invest trust funds in the stocks of a National Bank. We have seen that such investments are unauthorized in Wisconsin but it does not follow as already stated, that the transfer of the stock by the executors to themselves as trustees was a void transaction. The trustees took the title and so long as that transaction is per-
43 mitted to stand the estate in the hands of the executors is not liable to the receiver for any assessments made on the stock and if the estate is not liable then no legatee of the estate is liable under the provisions of the Wisconsin Statute. We do not find it necessary to express any opinion concerning the liability of the defendant Cobb as a legatee of the estate under the Wisconsin Statute in case the transaction is set aside. At the time he received his share of the estate of the testatrix the bank was apparently amply solvent and continued to be solvent for many months afterwards. Whether the title he then took can be affected by what happened

after . . s is a question which does not need to be determined so long as the title stands in the trustees.

The court below was clearly correct in its conclusion that the bill in its present form could not be maintained. The question remains whether the court was right in refusing the complainant the privilege of amending his bill in such manner as would cure it of its defects. The allowance or refusal of amendments is a matter which is largely within the sound discretion of a trial court and in the absence of a clear abuse thereof its action is not reviewable on appeal. We cannot say that the court grossly abused its discretion in refusing to allow the bill to be amended. The fact that we might have permitted the bill to be amended if we had been in the trial court's place does not justify us in interfering with the exercise of that court's discretion unless we are satisfied that its discretion has been grossly abused.

The decree dismissing the bill and entering judgment for defendant is affirmed.

44 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 26th Day of December, One Thousand Nine Hundred and Fourteen.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry Wade Rogers, Circuit Judges.

CHRISTOPHER L. WILLIAMS, as Receiver, etc., Complainant-Appellant,

vs.

JOHN P. COBB, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
H. W. R.

45 Endorsed: United States Circuit Court of Appeals, Second Circuit. C. L. Williams vs. J. P. Cobb. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 29, 1914. William Parkin, Clerk.

46 United States Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,
against
JOHN P. COBB, Appellee.

Upon the annexed consent and upon the motion of Barber, Watson & Gibboney, it is hereby

Ordered that Messrs. Barber, Watson & Gibboney be substituted as attorneys for Christopher L. Williams, the plaintiff herein, in the place and stead of Messrs. Dichman & Heffernan.

E. H. LACOMBE,
U. S. C. J.

47 United States Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,
against
JOHN P. COBB, Appellee.

It is hereby stipulated and consented that Messrs. Barber, Watson & Gibboney be substituted as attorneys for the appellant herein, in the place and stead of Messrs. Dichman & Heffernan and that an order may be entered to that effect without further notice.

Dated New York City, N. Y., April 6, 1915.

CHRISTOPHER L. WILLIAMS,
Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant.
DICHMAN & HEFFERNAN,
Solicitors for Appellant.

STATE OF NEW YORK,
County of New York, ss:

On the 6th day of April, 1915, before me personally appeared Christopher L. Williams, to me known and known to me *by* be the appellant in the above entitled action and he duly acknowledged that he had executed the foregoing consent to substitution of attorneys.

GEO. M. BINDELL,
Notary Public, New York County.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Christopher L. Williams, as Receiver, etc., Appellant, against John P. Cobb, Appellee. Consent and order of substitution. Barber, Watson & Gibboney, attorneys for appellant, 165 Broadway, New York City. John B. Sanbord, of counsel. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 19, 1915. William Parkin, Clerk.

48 United States Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,

vs.

JOHN P. COBB, Appellee.

Assignment of Errors.

And now comes the appellant and makes and files the following assignment of errors upon which he will rely his appeal in the above entitled cause.

First. That the Circuit Court of Appeals erred in affirming the decree of the District Court dismissing the bill of complaint herein.

Second. That the Circuit Court of Appeals erred in not reversing the decree of the District Court, with instructions to overrule the demurrer to the bill of complaint.

Third. That the Circuit Court of Appeals erred in holding that the bill of complaint herein does not state a cause of action against the defendant.

Fourth. That the Circuit Court of Appeals erred in holding that the transfer of the stock of the First National Bank of Min-
49 eral Point, Wisconsin, from the estate of Laura A. Cobb to Calvert Spensley and John P. Cobb as trustees, as set out in the complaint herein, was not void under the laws of the State of Wisconsin.

Fifth. That the Circuit Court of Appeals erred in not holding that the defendant, John P. Cobb, was, under the facts set out in the complaint herein, individual and personally liable upon the assessment upon the shares of stock of the First National Bank of Mineral Point, Wisconsin, described in said complaint.

BARBER, WATSON & GIBBONEY,
Solicitors for Appellant.

JOHN B. SANBORN,
Of Counsel.

50 (Endorsed:) U. S. Circuit Court of Appeals for the Second District. Christopher L. Williams, as Receiver of the First Nat'l Bank of Mineral Point, Wis., Appellant, against John P. Cobb, Appellee. Assignment of Errors. Barber, Watson & Gibboney, Attorneys for Appellant, 165 Broadway, New York City; John B. Sanborn, Esq., of Counsel. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1915. William Parkin, Clerk.

51 United States Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,

vs.

JOHN P. COBB, Appellee.

The above named appellant, Christopher L. Williams, as Receiver of the First National Bank of Mineral Point, Wisconsin, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment has therein been rendered on the 15th day of December, A. D. 1914, affirming the decree of the District Court of the United States for the Southern District of New York; that the matter in controversy in said suit exceeds One Thousand ($1,000) dollars, besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellant prays that an appeal be allowed in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning the
52 same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed herewith by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

BARBER, WATSON & GIBBONEY.
Solicitors for Appellant.

JOHN B. SANBORN,
Of Counsel.

53 (Endorsed:) U. S. Circuit Court of Appeals for the Second District. Christopher L. Williams, Receiver of the First National Bank of Mineral Point, Wis., Appellant, against John P. Cobb, Appellee. Petition for Appeal. Barber, Watson & Gibboney, Attorneys for Appellant, 165 Broadway, New York City; John B. Sanborn, Esq., of Counsel. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1915. William Parkin, Clerk.

54 United States Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,

vs.

JOHN P. COBB, Appellee.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed.

HENRY WADE ROGERS,
United States Circuit Judge, Second Circuit.

55 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Christopher L. Williams, as Receiver of the First Nat'l Bank of Mineral Point, Wis., Appellant, against John P. Cobb, Appellee. Order Allowing Appeal. Barber, Watson & Gibboney, Attorneys for Appellant, 165 Broadway, New York City; John B. Sanborn, Esq., of Counsel. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1915. William Parkin, Clerk.

56 United —— Circuit Court of Appeals for the Second Circuit.

CHRISTOPHER L. WILLIAMS, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant,
against
JOHN T. COBB, Appellee.

Know all men by these presents, that we, Christopher L. Williams as Receiver of the First National Bank of Mineral Point, Wisconsin, and the National Surety Company, a New York corporation with offices at No. 115 Broadway, in the Borough of Manhattan, City and State of New York, are held and firmly bound unto the above named John T. Cobb in the sum of five hundred dollars ($500) good and lawful money of the United States of America, to be paid to the said John T. Cobb for the payment of which, well and truly to be made, we bind ourselves, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of April, 1915.

Whereas, the appellant in the above entitled cause has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Second Circuit on the 15th day of December, A. D. 1914;

Now therefore, the condition of this obligation is such, that if the said appellant shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] CHRISTOPHER L. WILLIAMS,
As Receiver of the First National Bank of Mineral Point, Wisconsin.
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
W. M. McCARTHY,
Resident Ass't Secretary.

57 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of April, one thousand nine hundred and fifteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Christopher L. Williams as Receiver of the First National Bank of Mineral Point, Wisconsin, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Christopher L. Williams, as Receiver of the First National Bank of Mineral Point, Wisconsin, is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Three Million Five Hundred Thousand dollars.

That —— —— is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 3rd day of April, 1915.

H. E. EMMETT,
Notary Public, &c.
(Officer's Signature, description and seal.)

58 (Endorsed:) Court. United States Circuit Court of Appeals for the Second District. Christopher L. Williams, Receiver of the First National Bank of Mineral Point, Wisconsin, Appellant, against John P. Cobb, Appellee. Bond. Undertaking —. —— ——, Attorney for —— ——. Office and P. O. Address ——. The within bond or undertaking is hereby approved, both as to form and sufficiency of Surety. Dated April 29th, 1915.

Henry Wade Rogers, U. S. Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1915. William Parkin, Clerk.

59 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Christopher L. Williams, as Receiver, etc., against John P. Cobb as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of April in the year of our Lord One Thousand Nine Hundred and fifteen and of the Independence of the said United States the One Hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 5/11/15. W. P.]

60 United States Circuit Court of Appeals, Second Circuit.

The President of the United States to John P. Cobb and K. R. Babbitt, His Solicitor, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, wherein Christopher L. Williams, as Receiver of the First National Bank of Mineral Point, Wisconsin, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant in the said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 29th day of April, A. D. 1915.

HENRY WADE ROGERS,
United States Circuit Judge, Second Circuit.

Service of a copy of the within citation is hereby admitted this 29th day of April, 1915.

K. R. BABBITT,
Solicitor for Appellee.

61 [Endorsed:] U. S. Circuit Court of Appeals, Second Circuit. Christopher L. Williams, as Receiver of the First Nat'l Bank of Mineral Point, Wis., Appellant, against John P. Cobb, Appellee. Citation. Barber, Watson & Gibboney, Solicitors for Appellant, 165 Broadway, New York City. Service of copy of within citation is hereby admitted this — day or April, 1915. —— ——. Solicitor for Appellee. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1915. William Parkin, Clerk.

Endorsed on cover: File No. 24,721. U. S. Circuit Court — Appeals, 2nd Circuit. Term No. 125. Christopher L. Williams, as receiver of The First National Bank of Mineral Point, Wisconsin, appellant, vs. John P. Cobb. Filed May 12th, 1915. File No. 24,721.

BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

NO. 125

CHRISTOPHER L. WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, APPELLANT.

vs.

JOHN P. COBB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN B. SANBORN.
CHAUNCEY E. BLAKE.
Counsel for Appellant.

BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

NO. 125

CHRISTOPHER L. WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, APPELLANT.

vs.

JOHN P. COBB.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Circuit Court of Appeals for the Second Circuit which affirmed a decree of the District Court for the Southern District of New York, sustaining a demurrer to and dismissing a bill of complaint.

It appears from the bill that the First National Bank of Mineral Point, Wisconsin, was closed as insolvent and appellant duly appointed receiver, Record, p. 2. Thereafter the Comptroller of the Currency made an assessment of 100 per cent upon the stock of the bank, Record, p. 3. Among this stock were twenty shares standing in the name of John P. Cobb and Calvert Spensley, as trustees for Catherine Monohan, Record, p. 3. Laura A. Cobb, up to the time of her death, owned more than twenty shares of stock in this bank. By her will she directed that $2,000 be invested in interest bearing securities, the income from which was to be paid to Catherine Monohan during her life, Record, p. 3. This was not done but her executors transferred to themselves as trustees for Catherine Monohan twenty shares of stock in the bank

from shares owned by Laura A. Cobb, Record, p. 3. The remainder of her estate was distributed so that the executors had no assets, Record, p. 5. The defendant herein received from that estate more than $12,000, Record, p. 5. The time to file claims against the estate of Laura A. Cobb expired before the assessment on bank stock was made by the Comptroller, Record, p. 4.

To this bill the defendant interposed a demurrer for want of equity, Record, p. 9. This demurrer was sustained by Judge Hough and the bill dismissed, Record, p. 11. This decree was affirmed by the Circuit Court of Appeals, Lacombe, Coxe and Rogers, C. JJ., with an opinion by Judge Rogers, Record, pp. 17–23.

ASSIGNMENT OF ERRORS

Appellant has filed the following assignment of errors:

First. That the Circuit Court of Appeals erred in affirming the decree of the District Court dismissing the bill of complaint herein.

Second. That the Circuit Court of Appeals erred in not reversing the decree of the District Court, with instructions to overrule the demurrer to the bill of complaint.

Third. That the Circuit Court of Appeals erred in holding that the bill of complaint herein does not state a cause of action against the defendant.

Fourth. That the Circuit Court of Appeals erred in holding that the transfer of the stock of the First National Bank of Mineral Point, Wisconsin, from the estate of Laura A. Cobb to Calvert Spensley and John P. Cobb as trustees, as set out in the complaint herein, was not void under the laws of the State of Wisconsin.

Fifth. That the Circuit Court of Appeals erred in not holding that the defendant, John P. Cobb, was, under the facts set out in the complaint herein, individually and personally liable upon the assessment upon the shares of stock of the First National Bank of Mineral Point, Wisconsin, described in said complaint, Record, p. 25.

ARGUMENT.

The bill is based upon the theory that the transfer of the twenty shares of stock to Cobb and Spensley as trustees was void, or at least voidable at the suit of the receiver. If so, the title to the stock is in the Laura A. Cobb estate and that estate, or, as the estate has no funds, any person who participated in the distribution of the estate, is liable for the assessment.

The Transfer of Stock was Void.

The stock belonged to Laura A. Cobb in her life time. It passed to her estate on her death. The transfer by the executors to themselves as trustees was not authorized by the will or the statutes of Wisconsin. The will provided that $2,000 were to be invested in "interest bearing securities." Record, p. 3. Bank stock is not an "interest bearing security." Bank stock was not a legal investment for trust funds in Wisconsin unless expressly authorized by the instrument creating the trust. Chapter 317 of the Laws of Wisconsin for 1903 provided:

"Section 1. Every executor, guardian or trustee, except where it is otherwise expressly directed by the will or instrument of trust, if any, may invest trust funds in governmental and real estate securities, as provided by law, and also, may, under the direction and with the approval of the proper court, invest trust funds as follows: In the bonds of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Ohio, Michigan, Illinois, Minnesota and Iowa.

"In the bonds of any city or village in the state of Wisconsin, and also in the bonds of any city in any other of the said states having a population of not less than twenty five thousand, provided that such city or village shall not have defaulted in the payment of any of its bonded indebtedness during ten years immediately preceding such investment.

"In the mortgage bonds or preferred stock of any steam railway or railroad corporation in the United States owning and operating not less than five hundred miles of track, which has paid dividends upon its entire capital stock for ten years immediately preceding such investment.

"In promissory notes, which are or may be amply secured by pledge of any of the bonds, stocks or securities in which investment is hereinbefore authorized.

"Section 2. Nothing herein contained shall be construed to affect the power or jurisdiction of any court of the state of Wisconsin in respect to trusts and trustees."

See, In re Allis's Estate, 123 Wis. 223.

The Circuit Court of Appeals recognized that the act of the executors in transferring the stock to themselves as trustees was contrary to the terms of the will and illegal (Record, p. 20) but refused to consider it void (Record, p. 21). That court must of necessity have held that only the *cestui que* trust or a person interested in the estate could

have the transfer set aside as the bill prays that the transfer be avoided, Record, p. 6.

Section 2091 of the Wisconsin Statutes provides:

"When the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void."

This section does not seem to have been considered by the Circuit Court of Appeals. It has never been construed in Wisconsin. The section is contained in a Title which related to real property but there is nothing to indicate that it should be so restricted. Even if it is the court should apply the same rule to personal property unless there is some special reason for not doing so.

Graff v. Bonnett, 31 N. Y. 9.

Applying this section the investment in the bank stock was absolutely void. The entries on the books of the bank whereby Cobb and Spensley, as executors of the estate of Laura A. Cobb, transferred the stock to Cobb and Spensley as trustees for Catherine Monohan, were of no effect. The title to the 20 shares of bank stock remained in the Cobb estate.

Even if we regard the transfer of the stock as merely voidable yet the receiver of the bank has the right to ask that it be set aside. Section 5152 of the United States Revised Statutes provides:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name."

If the 20 shares of bank stock had remained in the Cobb estate the funds of that estate could be used to pay an assessment. If it had been sold in the due administration of the estate the purchaser would have been liable on the assessment. When, however, it was placed in a trust fund which had no other assets there was no way in which the assessment could be collected by the receiver as long as the title to the stock remained in Cobb and Spensley as trustees. The receiver is here seeking to set aside the transfer of the stock, if that be necessary, in order that he may collect the assessment. He should not be required to await the action of the *cestui que trust* nor should his right to recover the assessment be defeated if the *cestui* is unwilling to act.

Defendant is Liable as Next of Kin.

If the transfer of the stock be void, or voidable at the suit of the receiver, the defendant, having received assets from the estate of Laura A. Cobb, is liable on the assessment. The Statutes of Wisconsin provide:

"Section 3269. Actions against the next of kin or legatees of any deceased person to recover the value of any assets that may have been paid to them by any executor or administrator may be brought against all of the next of kin jointly or one or more of them, or against all of the legatees jointly or one or more of them.

"Section 3270. If such action be brought against the next of kin the plaintiff must show that he has been or will be unable, with due diligence, to collect his debt or some part thereof by proceedings in the proper county court or from the personal representatives of the deceased; and in such action the plaintiff may recover the value of the assets received by all the defendants in the action, if necessary to satisfy his demand, and the amount of the recovery shall be apportioned among the defendants in proportion to the value of the assets or the amount of the legacies received by each of them; and the costs of the action shall be apportioned in like manner; but no allowance or deduction shall be made from such amount on account of there being other next of kin or legatees to whom assets or legacies have also been delivered or paid. The judgment shall express the amount recovered against each defendant for damages and costs, and shall be docketed and enforced against each of them separately in like manner and with like effect as if they were separate judgments."

These sections authorize an action against the next of kin to recover a call on corporate stock where the estate of the stockholder has been closed and distributed before the call.

South Milwaukee Co. vs. Murphy, 112 Wis. 614.

The bill shows that all of the things required for a recovery under the Wisconsin statutes exist in this case. The receiver is unable to recover by proceedings in the County (probate) Court in Wisconsin as the estate has been closed, Record, p. 5. He cannot recover from the personal representatives of the deceased as they have no assets of the estate in their hands, Record, p. 5. He may therefore recover from the defendant as next-of-kin the amount of his claim as the defendant received more than that amount from the Cobb estate.

In the case of Mattison v. Dent, 176 U. S. 521, a stockholder in a National Bank died and his stock was distributed by a final decree in the administration proceedings but no change was made on the books of the bank so that the stock continued in the name of the deceased. After the final decree of distribution the bank was closed by the Comptroller of the Currency and an assessment was made upon the stock. Suit to recover the assessment was brought by the receiver of the bank in the state court in Minnesota against the widow and children of the deceased as next of kin under statutes substantially similar to sections 3269 and 3270 above quoted. Service was had only upon the widow and one of the children. The receiver recovered judgment in the state court. On writ of error to this court it was held that as long as the title to the stock remained in legal effect in the estate of the deceased such estate was liable for the assessment on the stock and that such assessment could be recovered from the next of kin under the statutes of Minnesota after the estate had been distributed.

It therefore appears from the bill of complaint that the transfer of the twenty shares of stock from the Laura Cobb estate to Cobb and Spensley as trustees for Catherine Monohan, was contrary to the directions of the will and to the statutes of Wisconsin and of no effect. The stock thus remained in equity in the Laura Cobb estate. If that estate had any funds it would be liable for the assessment made by the Comptroller of the Currency. As it appears, however, from the bill that that estate has no funds and that the claim of the appellant on the assessment cannot be collected from the estate, the appellee is liable as next of kin of Laura Cobb because he received in the distribution of her estate more than the amount of the assessment.

The decree of the Circuit Court of Appeals and of the District Court should be reversed with directions to overrule the demurrer.

Respectfully Submitted,

JOHN B. SANBORN.

CHAUNCEY E. BLAKE.

Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 125.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Wisconsin,
Appellant,

v.

JOHN P. COBB,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

K. R. BABBITT.
Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1916. No. 125.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Wisconsin,
Appellant,

v.

JOHN P. COBB,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT.

This controversy comes before the Court on an appeal from a judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the United States District Court for the Southern District of New York sustaining the defendant's demurrer and dismissing the bill of complaint herein.

The suit was brought to set aside the transfer of twenty shares of capital stock of the First National Bank of Mineral Point, Wisconsin, standing in the names of John P. Cobb and Calvert Spensley, as Trustees for one Catherine Monahan, and to have it declared that said stock was the property of the estate of Laura A. Cobb, deceased, the defendant's mother, from which he received a certain share as one of the legatees thereof, and that as such legatee, under a particular statute of Wisconsin, he

be held liable for an assessment of $2,000 levied against said stock (*fol.* 13).

The bill alleges that Laura A. Cobb at the time of her decease was the registered owner of more than 20 shares of the bank's stock; that under her will she directed her executors to invest the sum of $2,000 in interest-bearing securities and to pay over the income thereof to one Catherine Monahan, but that instead they took 20 shares of the bank's stock formerly owned by Laura A. Cobb and had them transferred on its books to themselves as trustees for Catherine Monahan, where they remained at the time of the failure of the bank (*fols.* 6, 7). The estate of Laura A. Cobb was finally distributed before the bank failed (*fol.* 9).

The defendant's demurrer to the bill was sustained by Judge Hough in a memorandum by him which will be found quoted in the opinion of the Appellate Court. An appeal was then taken by the Receiver to the United States Circuit Court of Appeals, which affirmed the decree of the lower Court in a unanimous opinion written by Judge Rogers, concurred in by Judges Lacombe and Coxe, (219 Fed. 663) and the appellant has taken an appeal to this Court from the judgment entered thereon.

We shall endeavor to show under the following points that the judgment appealed from should be affirmed.

I.

THE DECREE OF THE COUNTY COURT OF IOWA COUNTY, STATE OF WISCONSIN WINDING UP THE ESTATE OF LAURA A. COBB IS FINAL AND CONCLUSIVE AND CANNOT BE COLLATERALLY ATTACKED.

The estate of Laura A. Cobb had been wholly and finally distributed by her executors before the bank became insolvent, before the appointment of the Receiver and before the assessment was levied (*fol.* 9). The executors of said estate filed their final account in the County Court of Iowa County, State of Wisconsin, on July 28, 1908, more than a year before the bank failed, and made oath that said estate had been wholly distributed prior to that date, and that no other property or assets of the estate remained in their hands (*fol.* 10). It was, therefore, necessarily determined by said court that the transfer of said 20 shares of stock to the trustees of Catherine Monahan was proper and the finding of the court to that effect is binding and conclusive upon all interested parties, even strangers, including this Receiver. *Liginger* v. *Field,* 78 Wisc. 367. Black in his work on Judgments, (second edition) vol. 2, section 644, says that a decree of a probate court settling an executor's final account and discharging him from his trust after notice, in the absence of fraud, is conclusive upon all matters or items which came directly before the Court until reversed; that it will be presumed it was founded upon proper evidence and that every prerequisite to a valid discharge was complied with and cannot under any circumstances be impeached in a collateral proceeding.

The proceedings in the County Court of Wisconsin on the winding up and final settlement of said estate are conclusive as to all matters which were decided, or which might have been decided therein. *Cromwell* v. *County of Sac.*, 94 U. S. 351, at p. 358; *Fayerweather* v. *Rich*, 195 U. S. 276, at p. 300; *Henderson* v. *Henderson*, 3 Hare Chancery, 100, at p. 115; Black on Judgments (second edition), vol. 1, sections 245, 808. The proper forum in which the Receiver should have instituted his action was the County Court of Wisconsin. *Little Rock Junction Ry.* v. *Burke*, 66 Fed. 83, at p. 89; *Crouse* v. *McVicker*, 207 N. Y. 213. Black on Judgments (second edition), vol. 1, sections 297*a* and 302.

II.

NEITHER THE DEFENDANT NOR THE ESTATE OF LAURA A. COBB WAS A STOCKHOLDER OF THE BANK WHEN IT FAILED; THEREFORE, NO ASSESSMENT MAY BE LEVIED AGAINST HIM EITHER DIRECTLY OR THROUGH SAID ESTATE.

At the time of the failure of the bank the 20 shares of stock in question were registered in the names of John P. Cobb and Calvert Spensley, as trustees for Catherine Monahan, upon the bank's books (*fols.* 7, 8, 9, 10, 12 and 13). The exact date when the stock was transferred to the names of the trustees does not appear but it must have been over a year before the bank failed, since it is alleged that on or before July 28, 1908, the executors rendered their final account on the distribution of the estate (*fol.* 10).

The right to enforce this extraordinary stockholder's

liability and the nature and extent thereof must be found in the National Banking Law, as contained in Sections 5139, 5151 and 5152 of the United States Revised Statutes. Section 5139 of said Statutes provides that every person becoming a stockholder in a national bank succeeds to all the rights and liabilities of the prior holder. It has been held that where stock has been regularly transferred in good faith on the books of a corporation and insolvency is not imminent such transfer operates to release the transferor of all liability in respect thereto. The authorities in support of this proposition have been carefully collected by Judge Thompson in his work on Corporations (second edition), vol. 4, section 4371.

In *Robinson* v. *Southern National Bank of New York,* 94 Fed. Rep. 964 (1899), (affirmed 180 U. S. 295), Judge Wallace, writing the opinion for the United States Circuit Court of Appeals, Second Circuit, in considering the liability of a person under the National Banking Act, said that an examination of the cases decided by the Supreme Court failed to disclose one in which the owner of the shares had been held liable under the sections referred to, who had never been the owner upon the books of the bank and had never held himself out as a stockholder or enjoyed any of the privileges as such.

In the case at bar the defendant never was a stockholder nor was the estate of Laura A. Cobb a stockholder at the time the bank failed. Everything was done that could have been done to transfer the ownership of the stock in question from said estate to the trustees and it stood in their names for over a year before the bank failed.

Upon the death of Laura A. Cobb the executors became

vested with the title to said stock and they had a perfect right to sell or dispose of it as they saw fit. As Judge Rogers said in his opinion (*fol.* 41):

> "It cannot be assumed that the transfer of the stock was void and without effect. Under the common law rule and in the absence of any statute providing otherwise an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass a good title to the property and it is not necessary to have any order of court for the purpose. *Munteith* v. *Rahn,* 14 Wis. 210; *In re Gay,* 5 Mass. 419; *Leitch* v. *Wells,* 48 N. Y. 585." See also 18 Cyc. 173; Cook on Corporations (second edition), vol. 1, section 329.

The bank could have been compelled by *mandamus* to make the transfer and having done so it was bound, and so is the Receiver, who stands in its place. *Scott* v. *Armstrong,* 146 U. S. 499; High on Receivers (fourth edition), section 205.

III.

THE TRANSFER OF THE STOCK ON THE BOOKS OF THE BANK TO THE TRUSTEES WAS SUFFICIENT TO CREATE A TRUST ESTATE ENTIRELY SEPARATE AND DISTINCT FROM THE ESTATE OF LAURA A. COBB.

When the stock was placed in the names of the trustees it ceased *ipso facto* to be the property of the estate and Cobb and Spensley from that time on held it as such trustees and no longer as executors. Judge Rogers on this point says in his opinion (*fol.* 41):

> "The legal difference between the two relations of executor and trustee is clearly defined and quite important, although it is sometimes difficult to de-

termine in a particular case whether an executor has ceased to hold a fund as executor and assumed the attitude of a trustee. In the case before us there seems to be no difficulty of that kind as the shares of stock were taken from the assets of the estate and transferred on the books of the company by the executors to themselves as trustees. In doing this the executors treated the stock as a separate trust fund and they held themselves out to the world as trustees of the fund for the *cestui que trust* Catherine Monahan. The stock then ceased to be a part of the assets of the testatrix and the executors ceased to hold as executors and from that time on have held as trustees."

See also *Ruffin* v. *Harrison,* 81 N. C. 208; *Matter of Johnson,* 170 N. Y. 139; 63 N. E. 63; *McWilliams* v. *Gough,* 116 Wis. 576; Hill on Trustees (fourth edition), page 335; Perry on Trusts and Trustees (sixth edition), vol. 1, section 263.

Nor was the consent of the *cestui que trust* necessary to vest title to said stock in the trustees; (*Fowler* v. *Gowing,* 152 Fed. 801 (affirmed 165 Fed. 890)) the action of the Executors at most being voidable at her election or the election of those interested in the estate and was not wholly void. Perry on Trusts and Trustees (sixth edition), vol. 2, sections 850-853; Beach on Trusts and Trustees, vol. 2, section 697; 39 Cyc. 413. At all events, the Receiver, who is a perfect stranger, cannot set aside the transfer. *French* v. *Shotwell,* 5 Johns. Ch. 555, 565; *Graham* v. *Railroad Company,* 102 U. S. 148.

IV.

TITLE TO THE STOCK IN QUESTION HAVING PASSED FROM THE COBB ESTATE TO THE TRUSTEES BEFORE THE BANK FAILED THE ESTATE IS NOT LIABLE.

In *Blackmore* v. *Woodward*, 71 Fed. 321 (U. S. Circuit Court of Appeals, 1895) it appeared that a testator bequeathed to his wife for life or widowhood forty shares of stock in a national bank, together with certain other property, and provided that she might use all of such property but on her death what remained should go in equal shares to his children. The administrator transferred the stock to the wife on the books of the bank before it became insolvent and an assessment having been levied on the stock suit was brought against the widow and judgment was obtained which remained unsatisfied. The receiver then brought a suit against the administrator to compel payment of the assessment out of the testator's general estate. Judge Taft, writing the opinion of the Court, concurred in by Judges Lurton and Hammond, held that whether the widow took an absolute title to the stock by virtue of her power of disposal or a life interest with remainder to the children the beneficial ownership of the stock in either case had passed from the testator's estate and that it could not be made liable for the assessment.

To the same effect see: *Witters* v. *Sowles*, 25 Fed. 168; 32 Fed. 130; *In re Box*, 1 Hemming & Miller, 552, 556; *Armstrong* v. *Burnett*, 20 Beavan, 424, 434; Jarman on Wills (sixth English Edition), vol. 2, p. 2035.

If the Cobb estate is not liable, then neither is this defendant.

V.

Former ownership of stock in question makes no difference in the absence of fraud.

The mere fact that the very stock which is the subject of this suit was formerly owned by testatrix cannot change the situation, nor is the Receiver in a position to question the action of the executors in transferring said stock from the estate to themselves as trustees in the absence of a specific allegation of fraud. *Sykes* v. *Halloway,* 81 Fed. Rep. 432-435; *Lucas* v. *Coe* 86 Fed. 972-974; *Fowler* v. *Gowing,* 152 Fed. 801 (aff'd 165 Fed. 891); *Williamson* v. *Beardsley,* 137 Fed. Rep. 467.

The bill will be searched in vain for any allegation or statement of fact charging fraud.

VI.

Reply to appellant's brief.

Appellant's counsel, on page 4 of his brief, refers to Section 2091 of the Wisconsin statute, which provides that every sale, conveyance or other act of a trustee in contravention of a trust is absolutely void. No reference was made to this statute in either of the Courts below nor is it pleaded in the bill. As appellant's counsel admits, it is contained in the statutes under the title relating to real property, but he argues that its application should be extended to personalty as well, citing *Graff* v. *Bonnett,* 31 N. Y. 9, in support thereof. If the contention of the appellant be sound then even before the enactment of Chapter 317 of the Laws of Wisconsin for

1903, quoted on page 3 of the appellant's brief and which now forms Section 2100-*b* of the Statutes of Wisconsin, an improper investment in stock would have been void. Many cases have been decided by the courts of Wisconsin dealing with the investment of trust funds from personal property, but in none we have examined, decided before or since the enactment of Section 2100-*b*, have they held an improper investment of trust funds absolutely void, nor have they referred to Section 2091 in determining the validity of an investment of such funds in contravention of the instrument creating the trust estate. At all events, it is sufficient to say that we believe the Courts of Wisconsin would not extend Section 2091 to cover personalty since in the case of *Lamberton* v. *Percles*, 87 Wis. 449-459, they have absolutely refused to follow the case of *Graff* v. *Bonnett* (*supra*), saying that in that case:

> "Denio, *C. J.*, dissented, and, after reviewing the prior decisions in that state, said: 'Hence, I conclude that there is nothing in our statute law which restrains the alienability of the interest of the beneficiary in a trust to receive and pay over the interest of money or of personal property.' 31 N. Y. 19. Thus it appears that notwithstanding the statutes of New York, so making the statutes respecting real estate also applicable to personal property, yet the highest court of that state very reluctantly reached the conclusions mentioned, and then only by a divided court. *In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property.*" (Italics ours.) See also *Friedrich* v. *Huth*, 155 Wis. 196; *Managan* v. *Shea*, 158 Wis. 619.

On page 4 of the appellant's brief it is said that if the twenty shares of stock had remained in the Cobb estate

the funds of that estate could have been reached to pay the assessment, or if the stock had been sold, the purchaser would have been liable, but when placed under a trust which had no other assets there was no way the assessment could be obtained by the Receiver so long as the title remained in the trustees.

Section 5152 of the United States Revised Statutes provides that persons holding stock as trustees shall not be personally liable as stockholders, but that the estate and funds in their hands shall be liable. Whether the particular trust estate for which the twenty shares of stock were held by the trustees has other assets which might be applied on this assessment makes no difference, for as Judge Coxe said in *Lucas* v. *Coe,* 86 Fed. 972, at p. 973:

> "The fact that the defendant is responsible and the *cestui que trust* presumably irresponsible is a matter of no moment. There is nothing requiring a shareholder in a national bank to be solvent, and these shares may be held alike by the millionaire and the pauper. The question for the receiver in making an assessment is, who owns the shares, not who is best able to pay?"

Conclusion.

For the reasons herein stated it is submitted that the judgment should be affirmed.

New York, October 25, 1916.

K. R. BABBITT,
Of Counsel for Appellee.

WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, *v.* COBB.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 125. Submitted November 17, 1916.—Decided December 18, 1916.

Defendant and another, executors, seeking in good faith to follow a testamentary direction to invest a sum in "interest bearing securities," on certain trusts, caused to be transferred to themselves as trustees certain National Bank shares belonging to the estate. Thereafter, their final account as executors, explaining this transaction and reporting the estate wholly distributed except for these shares, was approved by the proper court of Wisconsin. The bank afterwards becoming insolvent, suit was brought by the receiver to recover the amount of an assessment levied upon the shares by the Comptroller of the Currency, the bill seeking to hold the defendant, (who had received a larger amount as legatee), under a Wisconsin law making distributees liable for debts of estates in certain cases.

Held, (1) That whether or not the shares were "interest bearing securities," the transfer was not void.

(2) Title being in the trustees, the estate was not liable for the assessment, and consequently defendant could not be held as a distributee under the Wisconsin statute.

At common law executors have implied authority to pass title to personal assets of the estate—a rule which has not been modified in Wisconsin.

Section 2091, Wisconsin Statutes, 1913, providing that conveyances made by trustees in contravention of express trusts shall be absolutely void, does not apply to personal property.
219 Fed. Rep. 663, affirmed.

THE case is stated in the opinion.

Mr. John B. Sanborn and *Mr. Chauncey E. Blake* for appellant.

Mr. K. R. Babbitt for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1904 Laura A. Cobb died testate at Mineral Point, Wisconsin, and by her will directed her executors to invest the sum of $2,000 of her estate in "interest bearing securities," to pay the income thereof to Catherine Monohan during her life, and on her death to distribute the trust fund to certain persons designated in the will. The defendant, John P. Cobb, and one Calvert Spensley were appointed executors of Mrs. Cobb's will, and so administered her estate that in July, 1908, they filed their final account as executors, reciting that the estate was wholly distributed, with the exception of twenty shares of the capital stock of the First National Bank of Mineral Point, which the account stated the executors had caused to be transferred to themselves and registered in their names as trustees for Catherine Monohan.

The bank became insolvent and the Comptroller of the Currency on the third day of November, 1909, made an assessment of $100 upon each share of the capital stock of the bank for the payment of creditors.

The defendant was a son of the deceased, and, as legatee and distributee, received a sum of money greater than the amount of the assessment on the twenty bank shares.

The foregoing facts are all derived from the bill filed in

this case, to which the defendant demurred. The District Court sustained the demurrer and entered an order dismissing the bill. The Circuit Court of Appeals affirmed this decree, and the case is here upon appeal.

The theory upon which this suit was commenced is that the transfer of the twenty shares of bank stock by Cobb and Spensley, as executors, to themselves, as trustees for Catherine Monohan, is void; that the stock is as if it had never been transferred at all and is therefore an undistributed asset of the estate of Mrs. Cobb, and that the defendant, having received as legatee and distributee much more than the amount of the assessment, is liable under the Wisconsin statute to the Receiver for the assessment, a debt of the estate, all the other assets having been distributed before the failure of the bank.

Obviously the question as to the liability of the defendant turns upon whether the transfer of the stock to Cobb and Spensley, as trustees for Catherine Monohan, is void or voidable, for if it is voidable only this suit was improvidently commenced. At common law, and no Wisconsin statute is cited to modify the rule, an executor has full power, without any special provision of the will that he is administering or order of court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them. *Munteith* v. *Rahn*, 14 Wisconsin, 210; *In re Gay*, 5 Massachusetts, 419; *Leitch* v. *Wells*, 48 N. Y. 585; Perry on Trusts, §§ 225, 809. A sale by an executor, even to himself, is not void, but only voidable at the option of interested persons. *Grim's Appeal*, 105 Pa. St. 375; *Tate* v. *Dalton*, 41 N. Car. 562. And if, after such purchase from himself, an executor sells to another, the purchaser from him acquires a good title. *Cannon* v. *Jenkins*, 16 N. Car. 422.

No suggestion is made that the transfer of the stock by the executors to themselves as trustees was not made in good faith and it was obviously made under the conviction

that it was, if not "an interest bearing security," at least the equivalent of such a security. Very certainly this was the basis for the approval of the transaction by the appropriate Wisconsin court more than a year before the bank failed, and, for anything that appears in the record, prior to the time when the bank became insolvent.

The claim that the lower court failed to give proper effect to § 2091 of the Wisconsin statute cannot be allowed. The part of this section which is claimed to be applicable reads:

"When a trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void."

This section is found in a chapter devoted to "Uses and Trusts" of the title "Real Property and the nature and quality of Estates Therein" and the claim is made that its drastic provision should be extended to trusts in personal property. No Wisconsin court has so applied it, but, on the contrary, the Supreme Court of the State, in *Lamberton* v. *Pereles*, 87 Wisconsin, 449, refused to make other sections of this same chapter respecting real estate applicable to personal property, saying "In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property." It is significant also that in the statute dealing with "Trust Investments," no such provision is found. Wis. Stat. Sup., § 2100b.

It results that, since the executors had lawful authority to dispose of the bank shares, assets as they were of the estate, so long as the transfer is permitted to stand unassailed directly the title to them is in the defendant and Spensley, as trustees for Catherine Monohan, and that the estate of Mrs. Cobb is not liable to the Receiver for the assessment claimed. If the estate is not liable the

defendant, as legatee and distributee, is not liable and the claim in suit, obviously without natural equity, is therefore without technical merit and the decree of the Circuit Court of Appeals must be

Affirmed.